



UNITED STATES SENATE
**REPUBLICAN
POLICY COMMITTEE**

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Who Stalled Terrorism Reinsurance? – Democrats and Their Trial-Lawyer Friends

The majority – Senator Daschle – has been trying since December 2001 to reach agreement on bringing up legislation to deal with this growing problem. . . . The issue is too important to be caught up in political agendas at this stage.

–Majority Whip Reid, *Congressional Record*, S4932, June 4, 2002

The GOP and its business backers want accompanying limits on tort lawsuits; the Republican-led House included them in its bill last year. But trial lawyers just as strongly oppose them, helped by their allies in the Democrat-controlled Senate.

– *The Wall Street Journal*, May 1, 2002

In the nine months since 9/11, Congress has attempted to construct a terrorism reinsurance bill. The House of Representatives passed its version last November, but the legislation stalled in the Democrat-led Senate. The Democrat leadership has habitually blamed Republicans for delaying the terrorism reinsurance bill. A review of the bill's history reveals that it was the Democrat Leadership, with their close ties to trial lawyers, that held the bill hostage.

Trial Lawyers Block Bipartisan Bill

On October 24 and 25, the Senate Banking Committee held its first hearings on the reinsurance measure. On November 1, after days of negotiations with the White House, Senators Sarbanes, Gramm, Dodd, and Enzi unveiled their bipartisan consensus bill. The consensus bill contained a \$10-billion deductible for the first two years and a \$20-billion deductible if the Treasury Department opted for a third year. Also contained in the bipartisan Senate bill were liability reforms, including consolidation of cases in federal courts and a prohibition on punitive damages for both taxpayers and private parties.

That bipartisan bill was never introduced. It was scrapped when Majority Leader Daschle objected to its liability restrictions. (Instead, Senator Gramm and other Republican Senators introduced the bill with no Democrat cosponsors, S. 1748/S. 1751). *CongressDaily* reported at the time that the consensus agreement “was effectively scrapped after Senate Majority Leader Daschle and

other Democrats raised a red flag on the bill's language limiting punitive damages" [*CongressDaily*, November 28, 2001].

Other news publications reported the same theme:

"Democratic Leader Tom Daschle killed an earlier bipartisan Senate compromise because it included such limits [on punitive damages]. He and Commerce Chairman Fritz Hollings are carrying water for the trial lawyers, who fly American flags outside their million-dollar homes but then want to cash in on Osama bin Laden's handiwork" (*Wall Street Journal*, November 26, 2001).

"Unfortunately, Senate Majority Leader Tom Daschle, D-S.D., sat on a bipartisan Senate compromise that limited punitive damages. The reason was purely partisan. The American Trial Lawyers Association is even more influential with the Democratic Party than the bosses of organized labor, and the trial lawyers don't intend to stand for any legislation placing limitations on liability, including a cap on punitive damages" (*The Houston Chronicle*, November 28, 2001).

"Senate Majority Leader Daschle and other Democratic leaders rejected that [Sarbanes/Gramm/Dodd/Enzi] agreement, because of its inclusion of what they consider unpalatable legal reforms" (*CongressDaily*, November 30, 2001).

The Senate is considering terrorism insurance legislation in June – seven months after House passage – because the Democrat Leadership killed a bipartisan effort to address the issue last November. Their reason? The bill precluded trial lawyers from seeking punitive damages from the victims of terrorism.

Terrorism Insurance and Liability

The issue of liability is strictly tied to the question of terrorism insurance. To date, all parties have agreed that in exchange for making the taxpayer explicitly liable for future terrorist attacks, there should be a limitation on exactly what that liability is. This approach is in keeping with past practices.

For example, the Federal Tort Claims Act (FTCA) outlines the rules under which suits are brought against the federal government (i.e., the taxpayer). The law provides that the United States shall be liable for torts "in the same manner and to the same extent as a private individual under like circumstances" but shall not be liable for punitive damages (28 USC 2674); that the federal district courts have exclusive jurisdiction of FTCA claims (28 USC 1346(b)) and the provisions of FTCA provide the exclusive remedy for tort claims (28 USC 2679); and that attorney's fees are capped at 25 percent of any judicial award and 20 percent of any administrative award with fines and jail as penalties for violating the caps (28 USC 2678).

All the major bills and amendments introduced to provide terrorism insurance include some type of limitation on liability:

Senate Bipartisan Agreement (S. 1748/1751): Bans punitive damages for both private and public defendants, and consolidates suits in federal courts .

House-Passed Version (H.R. 3210): Punitive Damages are prohibited. With respect to pain and suffering and other non-economic damages, each defendant shall only be liable for the share of damages for which that defendant is responsible. Attorneys fees are limited to 20 percent of damages or 20 percent of any court-approved settlement. (Source: Congressional Research Service, RL31209, December 7, 2001)

Gramm/McConnell Amendment: Punitive damages would be prohibited against business and property owners, “unless they were convicted of a felony that contributed to losses caused by a terrorist attack” (Amendment #3836).

Democrat Bill (S. 2600): Bans punitive damages leveled against the federal government and restricts suits to federal courts.

Private vs. Public Liability

The critical question facing the Senate is whether, having made the taxpayer explicitly liable for losses resulting from a terrorist attack, we should create two standards of liability for future terrorist attacks – one for the taxpayer and one for victims of terrorism who may happen to run a business or own a building.

The absurdity of the Democrat proposal allowing trial lawyers the ability to seek punitive damages against private parties is made clear when you consider possible terrorist attacks. Here’s one example:

A suicide bomber enters a restaurant in a large U.S. city and detonates a bomb, killing himself and several others, and destroying the building. One of the victims happens to be the owner of both the restaurant and the building. Under the Democrat position, trial lawyers representing some of the victims (the patrons) should have the right to seek punitive damages against another victim (the owner) of the same terrorist act.

Keep in mind, the point of punitive damages is to punish a defendant because he acted with recklessness, malice, or deceit. Senate Democrats have never justified why this restaurant owner should be held liable for actual damages – and then be punished by punitive damages, as well.

Avoid the Boondoggle

The Senate has the opportunity to fix the inequity inherent in the Democrat bill. Senator McConnell's amendment to create a compromise liability standard would permit punitive damages to be recovered against private parties *only* if they have been convicted of a crime in relation to the terrorist act.

While the McConnell amendment retains the dual liability standard in the underlying Democrat bill, it does make it more difficult for trial lawyers to raid private parties who have been attacked by terrorists.

Meanwhile, the President and his senior financial advisors have made it clear that the President is opposed to being presented with a bill that "leaves the American economy and victims of terrorist acts subject to predatory lawsuits and punitive damages."

After seven months of stalling, Senate Democrats will have the opportunity to choose. Do they side with the victims of terrorism? Or do they side with the trial lawyers?

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Attachment

A Comparison of the Leading Terrorism Reinsurance Proposals

	Senate Bipartisan Bill	Gramm/ McConnell	Dodd/ Sarbanes/ Schumer/Reid	House- Passed Version	Federal Tort Claims Act
Federal Jurisdiction	Yes	Yes	Yes	Yes	Yes
Consolidation	Yes	Yes	No	Yes	Available
Cap on Attorneys' Fees	No	No	No	Yes, at 20%	Yes, at 25%—judicial award; and at 20%—admini- strative award
Bans Punitive Damages	Yes	Yes – unless convicted of relevant felony	Not for private defendants	Yes	For the Federal Government